IN THE

Supreme Court of the United States

October Term, 1945.

The E. Kahn's Sons Company, an Ohio Corporation, *Petitioner,*

v.

Chester Bowles, Price Administrator, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Preliminary Statement.

The foregoing petition contains a summary statement of the case, as well as a citation of the opinion below, statement of grounds of jurisdiction, and citation of the statute involved.

The central question presented is whether the Price Administrator possesses the unprecedented power to compel the sale of major products of commerce at less than the cost of production. The Price Administrator and the Court below have inferred this extraordinary power from a statute which authorizes the Administrator merely to fix prices, contains no grant of power to appropriate private property or to levy either capital or income taxes, and, in

fact, limits the grant of price-fixing power by the requirement that such prices must be "generally fair and equitable" to the sellers. The commodity involved, fresh beef, is the primary product of cattle slaughter, and is a basic commodity in our national economy. The product is needed by every household. Cattle are slaughtered and fresh beef produced in almost every state. (R. 245) The Price Administrator has asserted the power to impose and maintain maximum prices on this major and basic commodity below the cost of production, *even below the out-of-pocket cost,* and the Emergency Court has approved, in the face of the general statutory requirement and a special statutory amendment specifically requiring that "*on products* resulting from the processing of agricultural commodities, *including livestock,* a generally fair and equitable *margin* shall be allowed for such processing." (Italics ours.) The asserted power finds no support in the language of the statute but is plainly contradicted by it; and at no place in the legislative history, either at the time of original enactment or subsequently, is there a suggestion that Congress intended, or the Price Administrator proposed, the maintenance of prices on any major and basic commodity in our national economy below the cost of production. Such a thought or proposal is in conflict with the general purpose of the statute to avoid "scarcities" of essential products and "to assist in securing adequate production of commodities." (Sec. 1 (a))

Specification of Errors.

The following are urged as the errors of the United States Emergency Court of Appeals:

1. The Court erred in not holding Revised Maximum Price Regulation No. 169 invalid as being arbitrary and capricious, not in accordance with law, and a violation of petitioner's rights under the Fifth Amendment to the Constitution.

2. The Court erred in holding the prices maintained by Revised Maximum Price Regulation No. 169 are "generally fair and equitable" as required by Section 2 (a) of the Emergency Price Control Act of 1942, as amended.

3. The Court erred in holding that the prices established by Revised Maximum Price Regulation No. 169 allow "a generally fair and equitable margin for . . . processing" as required by Section 3 of the Stabilization Act of 1942.

4. The Court erred in rejecting the standard accounting method established in the industry for determining the cost of producing fresh beef and in holding, in effect, that the cost of producing fresh beef is irrelevant to the determination of "generally fair and equitable" prices for fresh beef.

5. The Court erred in holding that where "over-all industry earnings are well above their normal peacetime level * * * the maximum prices in RMPR No. 169 must be deemed generally fair and equitable if they afford a sufficient margin to enable the industry generally to earn in its cattle operations as an entirety enough to cover its 'out-of-pocket' costs." (R. ~~449-450~~ 441 - 442.)

6. The Court erred in including in the "cattle operations as an entirety" for the industry as a whole the manufacturing operations of one large company involving cattle by-products when such manufacturing operations are not engaged in by the hundreds of typical and representative packing companies and are not representative of the industry as a whole.

7. The Court erred in considering all products containing any material obtained from the slaughter of cattle as a single product and in grouping with fresh beef production separate and independent operations.

8. The Court erred in failing to find that the cost of producing fresh beef in the typical and representative packing

plant and for the industry as a whole could fairly and properly be determined only by the established accounting method followed by the industry, and that fresh beef prices should be based on the cost of production so determined.

9. The Court erred in failing to find that petitioner had shown the prices in Revised Maximum Price Regulation No. 169 to be less than the cost of producing fresh beef by typical and representative packers in all price zones throughout the country.

10. The Court erred in defining "out-of-pocket" costs so as to exclude administrative and selling expenses.

ARGUMENT.

Revised Maximum Price Regulation No. 169 is invalid because the prices provided yield less than the cost of producing the products.

The prices established by RMPR No. 169 are for fresh beef in carcasses and wholesale cuts. The basic price is that provided for carcasses, the prices on the wholesale cuts made therefrom merely reflecting the fair differential in cost for the breaking of the carcasses into cuts. For this reason the Price Administrator in issuing the regulation and in considering the protests employed the basic carcass price throughout his discussions and the parties to the protest proceeding, as well as the Court below, have followed the same practice.

It should be emphasized at the outset that the Price Administrator has conceded throughout the proceedings that the industry has suffered losses in the production of fresh beef under the maximum prices. It was for this reason that he brought about the payment of a special subsidy of 80 cents per cwt. on the weight of cattle slaughtered to those producers who engage in no processing operations involv-

ing the use of carcass beef.* The position of the Price Administrator has simply been that such losses should be offset by profits from other operations, even from operations having no relation of any kind to fresh beef production or cattle operations. The Emergency Court has upheld the Price Administrator in disregarding losses on fresh beef and has ruled that, where over-all earnings of the industry as a whole from all operations are adequate, the losses on fresh beef are irrelevant so long as all cattle operations in their entirety yield as much as "out-of-pocket" expenses.

The justification advanced by the Price Administrator in his consideration of the protests, and by the Court below, for disregarding the industry's losses on fresh beef is the profits obtained by a few large packers from processing the by-products of cattle slaughter, namely, the manufacture of leather, soap, etc. This justification has no support in the operations of the hundreds of independent packing companies who constitute the bulk of the industry from the standpoint of numbers. Such companies do not engage in the processing operations conducted by the few big packing companies. The 16th Census of the United States covering the year 1939 found 1,478 wholesale meat packing establishments, including both slaughtering and non-slaughtering establishments. (*Manufactures, 1939—Meat Products*) Excluding the non-slaughtering establishments and those who slaughter cattle but do no processing, there remain hundreds of cattle slaughterers who do not receive the special subsidy of 80 cents per cwt. and who constitute the typical and representative packers subject to RMPR No. 169.

Petitioner's evidence (a) showed the character and scope of cattle operations of these typical and representa-

* Under the Directive of the Office of Economic Stabilization establishing this payment eligibility to receive the special payment is not based on the processing of by-products of cattle slaughter but on the sale of not less than 98 percent of the carcass production from all grades of cattle in carcasses or non-processed cuts. (8 F. R. 14641)

tive packing companies; (b) showed that the standard accounting method followed by the industry, the so-called cut-out test method, included the cattle operations of such companies in their entirety except for sausage manufacture; (c) showed that sausage manufacture has almost no relation to fresh beef production; and (d) that the maximum prices on fresh beef failed by wide margins to equal the costs of such companies in producing fresh beef. The calculations of the Price Administrator when applied to such companies showed a loss of $10 per head at ceiling cattle prices but the Emergency Court found that the Price Administator had underestimated the costs of slaughtering and handling fresh beef by $3 or $4 per head. Included in petitioner's evidence is the affidavit of the Accounting Committee of the National Independent Meat Packers Association and based on what that Committee deemed to be fair average expense and operating figures the losses suffered by such companies were approximately $17 per head when cattle were purchased at ceiling prices. At minimum cattle prices such companies were able to do no better than break even using the Administrator's own calculation and the subnormal expenses which he employed. On basis of the Accounting Committee's figures, the representative and typical packer suffered losses of $7 per head even when cattle were purchased at minimum prices.

The only "cattle operation" of the typical and representative packer not completely and fully reflected in the loss calculation by the Price Administrator and by the Association Accounting Committee is the manufacture of sausage. The major raw material in sausage is pork but some beef is mixed with the pork. However, the beef used in sausage manufacture is not obtained from fresh beef operations but from the slaughter of lower grades of cattle not suitable for fresh beef. (R. ~~236~~ 239) The only materials obtained from fresh beef operations and used in the manufacture of sausage are a few pounds, 15 to 20 pounds from a 1,000 pound steer, of trimmings or edible offal. (R. ~~237~~ 239) The

few cents of sausage profit which might be "allocated" or attributed to these few pounds of raw material could not possibly equal the loss of more than $10 suffered under the maximum prices on the carcass obtained from the 1,000 pound steer. (R. 237) Petitioner's profit from sausage manufacture is no more than 2 cents per pound. (R. 199) It might, therefore, allocate to each 1,000 pound steer 30 or 40 cents of sausage profit (for the 15 or 20 pounds of raw material) against a loss in slaughtering the animal for fresh beef of approximately $15.

Petitioner showed that its losses on fresh beef could not possibly be offset by any profits it obtains in the processing of beef or the manufacture of sausage. Its evidence shows that its profits from processed cuts and sausage amounted to only 8 cents per cwt. on its total cattle slaughter as compared with the 80 cents per cwt. special subsidy paid to non-processing cattle slaughterers to overcome their losses and provide some margin. Only a small fraction of petitioner's losses are offset by the processing profit of 8 cents per cwt. on the weight of cattle slaughtered. (R. 298-299)

The affidavit of the Association Accounting Committee showed that in the slaughtering of a steer to obtain fresh beef, the packer obtains the following products:

1,000 lb. Grade "A" Steer Yield

	Weight	Value
Carcass	550 lbs.	$118.25*
Hide	70 lbs.	$ 8.35**
Edible by-products (Hearts, liver, head and cheek meat, sweetbreads, tongue, tripe, brain, etc.)	37.3 lbs.	$ 5.71
Tallow	50 lbs.	$ 4.25
Dried blood and tankage	37 lbs.	$ 1.27

Note: Yields and values stated by Accounting Committee, National Independent Meat Packers Association. (R. 260)

175* Chicago Price, Grade A, Statement of Considerations. (R. 173)

** Value after curing. (R. 260)

The typical and representative packer processes these products only to the extent necessary to place them in a marketable condition. The values shown for the various products are the maximum which the packer can obtain for these products at OPA ceiling prices when they are placed in a marketable condition. When the Price Administrator or the Association Accounting Committee applies the industry's standard accounting method of determining the cost of producing fresh beef, known as the cut-out test method, all products resulting from slaughter are priced in a marketable condition. *The cut-out method shows a loss in fresh beef operations only when the cost of cattle and the expense of operations are greater than the total amount which can legally be obtained for all the products.*

Maximum prices below the cost of production of hundreds of typical and representative packers in every price zone throughout the country are obviously not "generally fair and equitable" to the industry as a whole and do not provide the "generally fair and equitable margin for . . . processing" required by the statute. In sustaining the maintenance of the fresh beef prices in spite of the losses on fresh beef the Price Admnistrator justified his course entirely by the processing operations of the few large packers because such companies handle approximately one-half of the total cattle slaughtered. On reopening the Price Administrator was presented with petitioner's evidence regarding the operations of the hundreds of typical and representative packing companies but he adhered to his policy of determining the legality of his prices based on the operations of the largest companies because of their great volume. However, the Price Administrator did not seek to controvert the evidence presented by petitioner as to the scope and character of cattle operations in the typical and representative slaughtering plant. In his opinion on reopening the Price Administrator was able to mention only seven companies whose operations included the extensive processing. (R. ~~338~~ 340) Such extensive processing was taken

by the Price Administrator as "representative" of the industry because it is more or less true of the handful of large companies who slaughter about one-half of the total cattle slaughtered. It is, we submit, arbitrary and unlawful for the Price Administrator to impose upon hundreds of companies prices for fresh beef which are below their costs of production because a few large companies are able to offset their losses on fresh beef with profits from manufacturing operations not conducted by the industry generally.

The Price Administrator places much emphasis upon the fact that Armour and Company suffered losses on fresh beef operations in certain years prior to price control. The Price Administrator went so far as to make certain calculations employing average market quotations for cattle and carcasses for the purpose of demonstrating that the industry generally suffered losses on fresh beef operations prior to price control. This conclusion was conclusively contradicted by the existence, growth and development of hundreds of non-processing cattle slaughterers located throughout the United States whose successful operation rested solely upon the profitable production and sale of fresh beef. In order to keep these companies from "going to the wall" the special subsidy of 80 cents was established. Petitioner's evidence also contradicted the Price Administrator's assumption by a showing that petitioner had prior to price control consistently made a profit from fresh beef operations (R. ~~300~~ 193) and the profits made from fresh beef operations prior to price control by other companies, located in the states of Iowa, Tennessee, Kentucky, Delaware, Pennsylvania, Ohio and Missouri were also included in petitioner's evidence. (R. ~~245~~ 147)

If statutory language employed by Congress is to be considered with decent regard for the meaning of words, we believe it is inescapable that power delegated to the Price Administrator to fix "prices" and limited by the requirement that such prices must be "generally fair and equita-

ble'' to the sellers does not authorize the maintenance of prices on a major product of the packing industry, a basic product in our national economy, below the full cost of production. To be ''generally fair and equitable'' the prices must include a margin of profit. This has been placed beyond doubt by the McKellar amendment unless it be said that an act of Congress amending the Price Control Act is meaningless. That amendment requires that in fixing maximum prices on ''*products* resulting from the processing of agricultural commodities, *including livestock,* a generally fair and equitable *margin* shall be allowed for such processing.'' (Italics ours.) The purpose of Congress in amending the statute to require a ''margin'' on the ''products'' resulting from the processing of ''livestock'' cannot lightly be declared to be meaningless. When administrators treat laws of Congress as meaningless, or courts so treat them, even in time of war, we have abandoned Constitutional government and a government of law.

We have demonstrated above the fairness and reasonableness of the industry's method of determining the cost of producing fresh beef, particularly for the typical and representative packer as to whom it fully reflects his total operation in the production of fresh beef. It is, therefore, unnecessary on the petition to argue further the error of the Price Administrator and his lack of authority to disregard the industry's established cost practice and method contrary to Section 2 (h) of the Price Control Act, as amended.

For the foregoing reasons we submit that the Emergency Court erred in the particulars stated in failing to invalidate the prices maintained by RMPR No. 169 and that the national importance of the serious questions presented, not only as to the hundreds of meat packing companies, but as to all producers and sellers of essential products subject to the administrative orders of the Price Administrator, war-

rants the thorough consideration of the case by this honorable Court.

Respectfully submitted,

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Dated: May 29, 1945